IP 00-1040-C T/K Schulz v. Amer. Stnd. Ins. Co.
Judge John D. Tinder Signed on 3/13/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SHULZ, MALISA J., DEFT/THYIRD PARTY PLTF 06/22/00,	)	
Plaintiff,	)	
vs.	)	
AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN+ PETITIONER/THIRD PARTY DEFT,	)	CAUSE NO. IP00-1040-C-T/?
Defendant.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MALISA J. SCHULZ, Third-Party Plaintiff, vs. AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, Third-Party Defendant.	)	CAUSE NO: IP 00-1040-C T/K

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT[1]

This case comes to the court because of a dispute in the aftermath of an automobile accident that occurred on March 1, 1999. As a result of that accident, an action was brought in the Monroe County Circuit Court against Defendant/Third-Party Plaintiff Malisa Schulz. Schulz subsequently filed a third-party complaint against Third-Party Defendant American Standard Insurance Company of Wisconsin (American Standard), alleging that she had a policy of insurance with American Standard, and that it wrongfully denied coverage of her claims resulting from the accident. American Standard removed the third-party complaint to this court based on diversity jurisdiction. On May 15, 2001, cross motions for summary judgment were filed seeking a determination of whether

[1] This entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

the policy was in force at the time of the accident. For the following reasons, the court **GRANTS** American Standard's motion for summary judgment and **DENIES** Schulz's motion for summary judgment.

A. MOTIONS FOR SUMMARY JUDGMENT

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact, leaving the moving party entitled to judgment as a matter of law. FED. R. CIV. P. 56(C). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). An issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Baucher v. Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332, 334 (7th Cir. 1990).

B. UNDISPUTED MATERIAL FACTS[2]

The evidence taken in the light reasonably most favorable to Plaintiff Schulz shows the following.

American Standard insured three vehicles for Schulz. American Standard issued an insurance policy for Schulz's 1991 Geo Storm in July 1998. Subsequently, American Standard issued an insurance policy for a 1984 Chevrolet in September 1998 and a policy for a 1984 Ford in November 1998. The policy at issue in this case is for the 1991 Geo Storm which originally had a term from July 20, 1998 to October 20, 1998.

On the first page of the 1991 Geo policy, it provides: "**We** agree with **you**, in return for **your** premium payment, to insure **you** subject to all the terms of this policy." Under part VI, entitled General Provision, there are clauses which describe American Standard's right to cancel the insurance policy for the non-payment of premiums. Furthermore, paragraph 8(c) of this part provides:

> **(c) Non-Renewal.** This policy will automatically terminate at the end of the policy period if **you** or **your** representative do not accept **our** offer to renew it. **Your** failure to pay the required renewal premium when due means that **you** have declined **our** offer.

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[2] American Standard moved to strike portions of Schulz's "Designation of Material in Support of Third-Party Plaintiff's Motion for Summary Judgment," on the ground that the exhibits were not properly authenticated. However, Schulz's subsequently filed an amended designation which included Schulz's affidavit authenticating the necessary exhibits; therefore, the motion to strike is denied.

On September 17, 1998, notice was sent to Schulz requesting payment of the premium for the 1991 Geo Storm and the 1984 Chevrolet. Payment would extend coverage from October 20, 1998, to January 20, 1999. The payment requested to renew the 1991 Geo Storm policy was $256.80. The payment requested for the 1984 Chevrolet policy was $115.30. American Standard requested payment for both policies by October 20, 1998. Schulz sent check #1321 drawn in the amount of $256.80 to American Standard. With the payment, Schulz sent a handwritten note that she wanted the insurance for the 1984 Chevrolet cancelled.

American Standard received the payment and cancellation request on October 16, 1998. American Standard sent a cancellation notice to Schulz for the 1984 Chevrolet and the coverage on that vehicle ended on October 27, 1998. American Standard also credited the 1991 Geo policy for payment from October 20, 1998, to January 20, 1999.

As of November 24, 1998, the 1991 Geo policy was paid for through January 20, 1999 and the 1984 Chevrolet policy was cancelled. However, Schulz owed premiums on the 1984 Ford policy in the amount of $111.20 and had a total outstanding balance of $170.60. Later, Schulz cancelled the insurance policy on the 1984 Ford. On December 7, 1998, American Standard sent a cancellation notice to Schulz and the coverage on that vehicle ended on December 4, 1998.

On December 18, 1998, American Family sent a notice requesting payment and renewal of the 1991 Geo policy for three months following January 20, 1999 to Schulz. No

payment was made in response to this request.

A past due notice requesting payment was sent to Schulz. (Def. Ex. J). The statement showed that as of December 29, 1998, Schulz had an outstanding balance of $420.70. This amount includes (1) the $170.60 owed previously; (2) $309.20 for the renewal of her 1991 Geo Storm policy from January 20, 1999, to April 20, 1999; (3) a $5.00 handling fee; and (4) a credit in the amount of $64.10 for the cancellation of the Ford policy. (Def. Ex. J). The statement provided: "We have not received the Past Due Minimum Payment of $106.50. If payment is not received by 01-03-1999, the [1991 Geo Storm] policy will be cancel[l]ed or will not be renewed." (Def. Ex. J). She was also informed that if the total minimum payment of $216.58 was not made by January 20, 1999, the insurance policy for the 1991 Geo would be cancelled or would not be renewed. (Def. Ex. J).

A letter dated January 4, 1999, was sent to Schulz regarding the policy on her 1991 Geo. The letter provided:

Very important information - please respond immediately

$85.60 Amount past due for coverage which ends on 01-19-1999 12:01 a.m.

$188.68 Minimum due for coverage to continue past 01-19-1999 12:01 a.m. (includes the amount past due)

Important: If you choose not to continue this policy, please pay only the amount past due shown above.

Dear Malisa Jane Schulz

> We must cancel your policy because we have not received your payment for the amount past due as of the date of this notice. Cancel[l]ation will take effect 01-19-1999 at 12:01 a.m. Standard Time.
>
> We appreciate your business, and hope you'll consider continuing your coverage with us. Your coverage will continue with no interruption if you pay in full the larger amount shown above before the cancel[l]ation date. Please be sure to pay at least the amount past due shown above whether or not you wish to continue this coverage.
>
> * * *

(Def. Ex. K).

American Standard did not receive any premium payment from Malisa Schulz prior to January 19, 1999. According to American Standard the insurance policy on the 1991 Geo Storm was cancelled on January 19, 1999 for non-payment of premium.

On January 25, 1999, Schulz completed an application for insurance on the 1984 Ford. American Standard sent a payment notice to Schulz for January 25, 1999 to March 25, 1999, in the amount of $211.50. According to American Standard, on January 25, 1999, the only insurance policy issued to Schulz still in force was the new 1984 Ford policy. On February 9, 1999, Schulz mailed check #1740 for the amount of $216.58 to American Standard (Pl. Ex. E), which corresponds with the payment amount requested in the past due notice related to the 1991 Geo Storm. (Def. Ex. J). In the memoranda section of her check she wrote "91 Geo Insurance" and her account number. (Pl. Ex. E). However, American Standard applied the payment to the 1984 Ford policy, which it claims was the only policy in force at the time. American Standard argues that the insurance policy on the 1991 Geo Storm had been cancelled before the payment was made, therefore the

payment could not be applied to 1991 Geo policy.

On March 1, 1999, Schulz was involved in an accident while driving the 1991 Geo Storm. David Howson and Rachel Moore claim that they were stopped for traffic at an intersection when they were struck from the rear by the vehicle driven by Schulz. Schulz reported the automobile accident to American Standard on the day of the accident. Subsequently, American Standard sent Schulz a letter dated March 23, 1999, stating that American Standard had conducted an investigation into the accident and concluded that there was no coverage on the date of the accident for the 1991 Geo Storm. (Pl. Ex. H). American Standard explained that it applied the payment to satisfy her obligation on other accounts, instead of the 1991 Geo Storm. Thus, American Standard has refused to defend and indemnify Schulz for the accident under the terms of the insurance contract.

C. DISCUSSION

The task for this court is to decide issues of Indiana law as the court believes the Supreme Court of Indiana would decide them. In the insurance policy American Standard assumed a duty to defend and a duty to indemnify Schulz for certain risks as long as the policy is in force. Schulz does not dispute that the policy was properly cancelled on January 19, 1999, for non-payment of premiums. However, she raises three arguments for the proposition that despite the cancellation she should be covered under the policy. First, Schulz argues that American Standard's retention of the premium clearly marked "91 Geo

Insurance" should estop them from being able to argue that the insurance policy was cancelled. Second, Schulz argues that the receipt[3] of a proof of insurance card stating that the 1991 Geo policy was extended to April 20, 1999, should estop American Standard from being able to argue that the insurance policy was cancelled. Third, Schulz argues that she had the right to direct where her payment was to be applied, and her February 9, 1999, check was clearly marked "91 Geo Insurance."

The doctrine of promissory estoppel applies where there is a promise upon which the promisor could reasonably expect to induce action or forbearance of a definite and substantial character, which does in fact induce such action or forbearance, and injustice can only be avoided by enforcement of the promise. *Medtech Corporation v. Indiana Ins. Co.*, 555 N.E.2d 844, 847 (Ind. Ct. App. 1990). Under Indiana law, the doctrine of promissory estoppel requires proof of five elements: (1) a promise made by the promisor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise. *First National Bank v. Logan Mfg. Co., Inc.*, 577 N.E.2d 949, 954 (Ind. 1991). The reason for the promissory estoppel doctrine is to avoid an unjust result in that justice and fair dealing require that one who acts to his detriment on a promise should be protected by estopping denial of that

[3]The parties dispute when the proof of insurance card was received. The court will assume that the card was received when the Plaintiff contends it was, that is, after the February 9, 1999, payment. The date of receipt of the card will not change the outcome, though.

promise. *Id*. The purpose of the doctrine is to "preserve rights previously acquired and not to create new ones." *Id*.

With these principles in mind, the court will exam Schulz's arguments. First, Schulz argues that American Standard is estopped from denying insurance coverage because it retained her February 9th check which was marked "91 Geo Insurance." In support of this position Schulz cites *Hitt v. Githens*, 509 N.E.2d 210 (Ind. Ct. App. 1987). However, *Hitt* is not controlling in this case. In *Hitt,* Midwestern Indemnity Insurance Company insured two vehicles a 1977 Dodge Van and a 1968 Ford pick-up truck. *Id*. at 211. During the policy period the insured sold the 1977 Dodge and 1968 Ford and purchased a 1971 Buick Electra and a 1980 Camaro. The insured did not notify Midwestern of the two new vehicles. On July 21, 1981, the insured was involved in an accident while driving the 1971 Buick Electra. After the insured filed a claim, Midwestern notified the insured that the Buick Electra was not listed as a covered vehicle and denied liability under the policy. The plaintiff argued that Midwestern waived or was estopped from denying liability because it refused to return the liability premiums from the date the insured purchased the new vehicle until told that there was no coverage. *Id*. at 212. The court recognized that "[i]n many instances, an insurer's refusal to return unearned premiums will estop the insurer from denying liability under an otherwise void policy." *Id*. The court continued: "If an insurer retains the premiums paid on a policy which it knows to be void *ab initio* because of some breach which prevents any risk from attaching, the insurer will be estopped from denying liability under the contract." *Id*. However, in rejecting the plaintiff's argument the court

noted that Midwestern was still insuring some risk and the premiums were earned. *Id*. at 213. The same is true in this case. American Standard was not collecting premiums without providing a service for Schulz, the February 9th check was used to cover the 1984 Ford. The premiums were earned. Since American Standard was insuring the 1984 Ford there is valid consideration for her premium payments, and American Standard will not be estopped from denying liability.

Second, Schulz argues that the receipt of a proof of insurance card stating that the 1991 Geo policy was extended to April 20, 1999, should estop American Standard from being able to argue that the insurance policy was cancelled. The court disagrees. There are two errors in Schulz's argument on this issue. First, providing Schulz with a proof of insurance card was not a promise to provide insurance for the policy period. Second, even if providing a proof of insurance card to Schulz was a promise, it was not reasonable for Schulz to rely on it after receiving notice that her insurance was going to be cancelled on January 19, 1999, if she failed to make a payment. The court will explain these errors in more detail.[4]

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[4] The court also has serious doubts that the proof of insurance cards are provided to insureds with the expectation that they will be relied upon. The standard for testing a promisor's expectation is an objective one, this standard is established if American Standard had actual knowledge of Schulz's reliance or reasonably should have expected Schulz to rely on the promise. *D & G Stout, Inc. v. Bacardi Imports, Inc.*, 805 F. Supp. 1434, 1445 (N.D. Ind. 1992). No evidence has been presented to establish that American Standard expected, or even should have expected, Schulz to rely on the proof of insurance cards. Thus, American Standard should not be estopped from denying liability on the insurance policy.

Under the doctrine of promissory estoppel, "[a] promise is a voluntary commitment or undertaking by the party making it (the promisor) addressed to another party (the promisee) that the promisor will perform some action or refrain from some action in the future." *Medtech Corp. v. Indiana Ins. Co.*, 555 N.E.2d 844, 847 (Ind. Ct. App. 1990). Although no special form of words is necessary to create a promise, the mere expression of an intention is not a promise. *Id*. accord *Security Bank & Trust Co. v. Bogard*, 494 N.E.2d 965, 968-69 (Ind. Ct. App. 1986). "Thus, where A says, 'I am going to sell my house. I want $70,000 for it,' he has made a mere statement of intention and not a promise." *Security Bank & Trust Co.*, 494 N.E.2d at 969. Similarly, a prediction, opinion, or prophecy is not a promise. *Id*.; *Medtech Corp.*, 555 N.E.2d at 847.

In providing Schulz with a proof of insurance card, American Standard was not promising to insure the 1991 Geo for the policy period. At most, the proof of insurance card is a sign of American Standard's intention to continue insuring Schulz's 1991 Geo regardless of when the proof of insurance card was received. On the back of each proof of insurance card, it provided: "Examine Policy Exclusions carefully. This form does not constitute any part of your insurance policy or bond. * * * **Note:** This insurance Certificate is issued solely to satisfy the terms of the law in your state. The policy term shown on this Certificate is subject to the insured's compliance with general policy provisions." (Pl. Ex. F). Under the express language of the general policy provisions, the insurance coverage can be cancelled for non-payment of premiums. Therefore, the proof of insurance card is merely a statement of intention and not a promise to provide coverage for the policy

period. The court will not use the doctrine of promissory estoppel to prevent American Standard from arguing that Schulz's insurance was cancelled.

Indiana law also requires reasonable reliance by the promissee. *D & G Stout, Inc. v. Bacardi Imports, Inc.*, 805 F. Supp. 1434, 1445 n.3 (N.D. Ind. 1992), see *First National Bank*, 577 N.E.2d at 955 (finding that the promisee acted in reasonable reliance on the bank's promise to lend money). Schulz's reliance on the proof of insurance card, if any, is unreasonable under the facts in this case. Schulz received notices that she was behind on payment of her premiums. She received the letters dated January 4, 1999, which unambiguously told her that the 1991 Geo policy was going to be cancelled if American Standard did not receive payment by January 19, 1999. Schulz knew that she did not make a payment by January 19, 1999. Each proof of insurance card expressly stated that it was subject to the general policy provisions of the insurance policy. Thus, relying on the receipt of a proof of insurance card is clearly unreasonable in this case.

Schulz's final argument is that she had the right to direct where her payment was to be applied, and her February 9, 1999, check was clearly marked "91 Geo Insurance." In support of this position, Schulz's cites a Seventh Circuit opinion applying Illinois law - *In re Mount Calvary Baptist Church*, 70 F.3d 51 (7th Cir. 1995). However, there is a very important factual distinction between this case and *Mount Calvary Baptist Church*. Mount Calvary Baptist Church had six insurance policies with Church Mutual Insurance Company. *Id*. at 53. One of the policies was a multi-peril policy. Between July 5, 1989, and July 10,

1989, Church Mutual mailed notices of cancellation to Mount Calvary on three insurance policies, including the multi-peril policy, for non-payment of premiums. The cancellation notices provided that two policies would be cancelled on July 17, 1989, and the multi-peril policy will be cancelled on July 22, 1989, unless payment was received within ten days. *Id*. The total premium that had to be paid to keep the policies in force without interruption was $1,372.50. On July 13, 1989, Mount Calvary sent a check for payment in the amount of $1,372.50 to Church Mutual with the three cancellation notices. Church Mutual received the payment, but applied the payment to other balances owed and cancelled the three policies. A representative of the insured contacted Church Mutual and disputed the action. On September 11, 1989, Mount Calvary was destroyed by a fire. *Id*. at 52. Church Mutual denied liability under the insurance policy and argued that the policy had been cancelled for non-payment of premiums. The Seventh Circuit applied Illinois law that allows a debtor to specify the account to which payment should be made. *Id*. at 55. Thus, the Seventh Circuit concluded that Church Mutual misapplied the payment and that the multi-peril policy was in effect on the day of the fire, and reversed the district court decision.

The distinguishing factor in this case is that the February 9th payment came after the 1991 Geo Storm policy was cancelled. If the payment was received prior to January 19, 1999, and American Standard applied the payment to the 1984 Ford policy that would be a different case. In this case the policy was cancelled on January 19, 1999, and the payment was received after the 1991 Geo policy was cancelled. Schulz cannot simply direct the check to the cancelled policy and expect that the policy would be automatically

reinstated. An insurance policy is a written contract that memoralized the agreement and a meeting of the minds between the insurer and the insured is required. *Stockberger v. Meridian Mutual Ins. Co.*, 395 N.E.2d 1272, 1277 (Ind. Ct. App. 1979) (an insurance policy is a contract between the insurer and the insured and contract law is controlling). Schulz has not presented evidence, or even argued, that a contract to re-insure the 1991 Geo existed.

American Standard has presented evidence that the 1991 Geo Storm policy issued to Schulz was cancelled on January 19, 1999, for non-payment of premiums in accordance with its policy provisions and Indiana law. Schulz has failed to show a genuine issue of material fact for trial; therefore, American Standard is entitled to summary judgment.

D. CONCLUSION

For the foregoing reasons, American Standard Insurance is entitled to judgment as a matter of law on all claims stated in the Complaint. Summary Judgment is **GRANTED** to Third-Party Defendant American Standard Insurance, Malisa Schulz's motion for summary judgment is **DENIED**, and all remaining motions are denied as moot. Accordingly, final judgment shall be entered.

ALL OF WHICH IS ORDERED this 13th day of March 2002.

John Daniel Tinder, Judge
United States District Court

Southern District of Indiana

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